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RECORD NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES WILLIAM HANKS, JR.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that petitioner did not have a reasonable expectation of privacy in the mail parcel which he lawfully possessed as he walked through the airport concourse?

2. Did the court of appeals err in holding that the findings of fact issued by the Magistrate who initially heard petitioner's motion to suppress represented a thorough and balanced statement of the material evidence which was presented even though certain of these findings of fact were not supported by the evidence presented?

3. Did the court of appeals err in holding that the search of the mail parcel which occurred after the package was in the law enforcement agent's exclusive custody and control and before the petitioner was placed under arrest was somehow incident to said arrest?

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Table of Authorities.....	iv
Opinions Below.....	2
Jurisdiction	2
Constitutional Provision Involved	3
Statement of the Case.....	3
Reasons for Granting the Writ	12
(1) Certiorari Should Be Granted to Review the Holding that Petitioner Lacked a Reasonable Expectation of Privacy in the Mail Parcel he Lawfully Possessed Because said Holding is in Conflict with Decisions from Other Circuits and Because the Fourth Circuit's Narrow Standing Decisions Conflict with the Decisions of this Court	12
(2) Certiorari Should Be Granted to Review Certain of the Findings of Fact Which were not Supported by the Evidence Presented	16
(3) Certiorari Should be Granted to Review the Holding Below That the Search of the Parcel was Incident to an Arrest which Followed said Search Because this Holding Conflicts with the Decisions of this Court .	18

Conclusion 21

APPENDIX

Memorandum and Recommendations of Magistrate upon Petitioner's Motion to Suppress, August 13, 1985 . . . . . 1a

Order of the District Court, October 3, 1985 . . . . . 19a

Opinion of the Court of Appeals for the Fourth Circuit, June 9, 1985 . . . . . 22a

Order of the Court of Appeals for the Fourth Circuit Extending Time to File Petition for Rehearing, June 16, 1986 . . 28a

Order of the Court of Appeals for the Fourth Circuit Denying Rehearing and Rehearing En Banc, July 29, 1986 . . . . . 30a

TABLE OF AUTHORITIES

Cases	Page
Chimel v. California, 395 U.S. 752 (1969)	18
Jones v. United States, 362 U.S. 257 (1960)	12
Lee v. Gilstrap, 661 F.2d 999 (4th Cir. 1981) cert. den. 456 U.S. 907 (1982)	13
Rawlings v. Kentucky, 448 U.S. 97 (1980)	14
Rakas v. Illinois, 439 U.S. 129 (1978)	14
United States v. Bellina, 665 F.2d 1335 (4th Cir. 1981) ..	13
United States v. Chadwick, 443 U.S. 1. (1979)	19
United States v. Dickenson, 655 F.2d 559 (4th Cir. 1981) ...	13
United States v. Freire, 710 F.2d 1515 (11th Cir. 1983) cert. den. ___ U.S. ___, 104 S.Ct. 1277 (1984)	16
United States v. Givens, 733 F.2d 339 (4th Cir. 1984)	13
United States v. Ladd, 704 F.2d 134 (4th Cir. 1983)	13

Page

United States v. Manbeck, 744 F.2d 360 (4th Cir. 1984) cert. den. ____ U.S. ___, 105 S.Ct. 1197 (1985) 13

United States v. Richards, 638 F.2d 765 (5th Cir. 1981) ... 15, 16

United States v. Robinson, 414 U.S. 218 (1973) 18

United States v. Salvucci, 448 U.S. 83 (1980) 14

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 17

Constitutional Provisions

Fourth Amendment, United States Constitution 3

Statutes

Title 21 United States Code Section 841 (a)(1) 3

Title 28 United States Code Section 636 (b)(1)(c) 4

Title 28 United States Code Section 1254 (1) 3

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IN THE

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October Term, 1986

UNITED STATES OF AMERICA,

Respondent,

vs.

JAMES WILLIAM HANKS, JR.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner James William Hanks, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 9, 1986.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Fourth Circuit, Case No. 85-5251, of which review is sought here, is set out at pp. 22a-27a of the Appendix. The order denying rehearing and rehearing En Banc, which was unpublished, is set out at p. 30a-31a of the Appendix. The memorandum and Recommendation of the Magistrate denying Petitioner's Motion to Suppress which was unpublished is set out at pp.1a-18a of the Appendix. The Order of the District Court adopting the Findings of Fact and Conclusions of Law of the Magistrate which was unpublished is set out at pp. 19a-21a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 9, 1986. Petitioner's motion for an extension of time for filing his petition for rehearing was allowed on June 16, 1986. A timely petition for rehearing was filed and was denied on July 29,

1986. The jurisdiction of this Court is invoked under Title 28 U.S. Code Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

On May 10, 1985 the petitioner, James William Hanks, was indicted for Possession of the Schedule II Controlled Substance, Cocaine, a violation of Title 21 U.S. Code Sec. 841(a)(1). Thereafter, on July 8, 1985, he filed a motion to suppress certain evidence and an accompanying affidavit. On July 9, 1985 a hearing was held on his motion before the Honorable Barbara H. Delaney, United States Magistrate for the Western District of North

Carolina. At the hearing the petitioner was represented by Lyle J. Yurko, Attorney at Law of the Charlotte, North Carolina Bar and the Government was represented by Debra Stewart, Assistant United States Attorney. On August 13, 1985 Magistrate Delaney issued a Memorandum and Recommendation which recommended that his motion to suppress be denied. In apt time petitioner filed specified written objections to this recommendation unter Title 28 U.S. Code 636(b)(1)(c). On October 2, 1985 the Honorable Robert D. Potter issued an order denying petitioner's motion and adopting the findings of fact and conclusions of law of the Magistrate. On October 7, 1985 petitioner entered a conditional plea of guilty pursuant to a plea agreement reserving his right to review the adverse determination of his motion to suppress on appeal. The Court accepted the conditional plea and imposed an active sentence. On October 7, 1985 petitioner gave written notice of appeal from this Judgment.

After tendering a Joint Appendix the parties filed briefs in the Court of Appeals for the Fourth Circuit and oral arguments were heard on March 7, 1986. On June 9, 1986 the Court of Appeals entered its judgment affirming the decision below.

On June 16, 1986 the Court of Appeals granted petitioner's motion for an extension of time to file a petition for rehearing. On July 3, 1986 petitioner filed his petition for rehearing and suggestion for rehearing En Banc. On July 29, 1986 petitioners petition for rehearing and suggestion for rehearing En Banc were denied.

STATEMENT OF FACTS

Agent Jack Davis of the N.C. State Bureau of Investigation is assigned to Charlotte's Douglas Airport to attempt to discover and arrest persons transporting controlled substances. (Joint Appendix pp. 40-41 hereinafter referred to as J.A. pp. 40-41)

On January 17, 1985 Agent Davis was

watching passengers deplane from a non-stop Miami to Charlotte flight. (J.A. p. 42) The agent has been informed by DEA that persons transporting drugs from South Florida to Southern Virginia cities travel through Charlotte, N.C. (J.A. p. 42)

At approximately 8:40 p.m. Agent Davis was in the airport terminal and was in the company of two personal friends who are not law enforcement personnel, but who are karate experts and understand that what Agent Davis does is to watch the "Florida flights to catch people who are transporting cocaine." (J.A.pp. 64-69, p.81)

Agent Davis went to Gate #1 to observe passengers deplane from the Miami non-stop flight. (J.A. 42) Agent Davis then observed the petitioner exit the plane. (J.A.p. 42) His attention was drawn to Hanks because he was one of the last people to exit, was casually attired, wearing slightly tinted glasses, an open neck shirt, a gold-like necklace, had a

beard and was between ages 20-40 years old. (J.A.p. 43)

As Agent Davis then proceeded to Gate 15 where the Richmond flight was boarding, both his friends followed but kept their distance. (J.A. p. 45, p.69) Davis next saw the petitioner head toward the ticket counter and check into the Richmond flight by handing the ticket agent his airline ticket. (J.A. p. 45) When the ticket was removed from its folder Agent Davis was able to observe that it was a one-way ticket, paid for in cash, issued to Robert Anderson and had a Miami to Richmond via Charlotte itinerary. (J.A. pp. 45-46) Also Agent Davis did not see any baggage stubs on defendant's folder. (J.A. p. 46) As Hanks checked in, he made a passing comment that he needed to use a phone, gazed in Agent Davis direction and proceeded down the concourse glancing back over his shoulder twice. (J.A. pp. 45-46, pp. 69-71)

Agent Davis followed him toward the

phones and restrooms and then the agent approached, showed him his badge and identification and said "Excuse me would you mind speaking with me for a minute," and the defendant responded "Okay" or words to that effect, (J. A. p. 46) Agent Davis next told him that he was conducting a "narcotics investigation" and was seeking his co-operation, adding, "you're not under arrest." (J.A. p. 47) The petitioner responded, "I know I'm not under arrest because I haven't done anything wrong," and while he had begun to show some small signs of nervousness this was not unusual. (J.A. p. 47, pp. 71-73) The agent then asked the petitioner to produce his airline ticket and he complied. (J.A. p. 47) Agent Davis then returned the ticket to him and asked if he had any other identification and he said he did not. (J.A. p. 47)

Agent Davis stated that he would like to further seek his co-operation and asked him if he would consent to a search of his person and bags, also advising that he had a right to re-

fuse consent. (J.A. pp. 47-48) Defendant next responded "okay" or words to that effect. (J. A. p. 48) Davis next stated that they could stay where they were or go to a private area and he agreed to go to the more private place. (J.A. p. 48)

Agent Davis then took him to an under-construction ladies room where he patted him down. (J.A. p. 48) Agent Davis then took petitioner's carry-on bag and began to search it. (J.A. p. 48) After finding some clothing and folders, the agent discovered an 11" by 16" manila envelope addressed to a Raymond Coates with a Richmond, Virginia street address,which had a return address to Allen Gruin of Ft. Lauderdale, Florida and upon which there was 40 cents postage. (J.A. pp. 48-49, pp. 76-77) Agent Davis' opinion was that 40 cents was insufficient to mail the parcel. (J.A. p. 49)

Davis asked Hanks, "what is this?" and unfortunately he could not recall specifically the exact questions and responses which follow-

ed. (J.A. p. 50, p. 59, p.76) The petitioner responded "I don't know," either "this guy" or "a friend" "was in a bar last night and knew I was going to Richmond and asked me to deliver it for him." (J.A. p.50,pp. 76-77, p. 86) When asked about the friend's name or the guy's name either Hanks did not respond or said he did not know. (J.A. p.50, pp.76-78) When asked if he knew the addressee he either did not respond or said he did not know. (J.A. p.50, pp. 76-78) The agent then asked the petitioner, "Do you mind if I open this?" (J.A. p.78) The petitioner responded, "I don't think I can consent to that or I don't think I can consent to that search or I don't know if I can let you," "It's not mine." (J.A. p.50, p.78)

The petitioner next stated, "I would like to make a phone call." Agent Davis responded, "You may call whoever you like, you are not under arrest."(J.A.p.50) Davis had been

attempting to feel the package by squeezing it from the time he took it out of the luggage and by the time the petitioner reached the telephone to make his call the agent believed the package contained a powder with lumps in it. (J.A. p.82, p.89) When he reached a telephone he dialed a phone number in a quicker than usual fashion. (J.A. pp.50-51)

Maintaining exclusive control of the package, Agent Davis asked one of his friends to feel it and the friend felt it and said it felt like a powder with lumps in it. (J.A. pp. 80-81) At this point Agent Davis and friend were some 8-10 feet from the petitioner. (J.A. p.90) Agent Davis then closed the distance between himself and the petitioner while still retaining control of the parcel. (J.A. p.80)

As he closed the distance the agent heard the petitioner say, "I've got a problem at the airport, I've got to talk to Ed." (J.A. p.51) Agent Davis responded "I'm going to solve your problem by opening this package." (J.A. p.51)

When the agent opened the parcel he saw a white powder which later testing has shown to contain the controlled substance, cocaine. (J.A. p.56) Agent Davis then placed the petitioner under arrest and after booking transported him to the county jail. (J.A. pp.57-58) Agent Davis testified that throughout this encounter the petitioner was extremely polite and amiable. (J.A. p.54)

REASONS FOR GRANTING THE WRIT

(1) Certiorari Should be Granted to Review the Holding that Petitioner Lacked a Reasonable Expectation of Privacy in the Mail Parcel he Lawfully Possessed Because said Holding is in Conflict with the Decisions of other Circuits and Because the Fourth Circuit's Narrow Standing Opinions Conflict with the Decisions of this Court.

After this Court rejected the "automatic" standing rule of Jones v. United States, 362 U.S. 257 (1960) in Fourth Amendment cases the decisions of the Court of Appeals for the Fourth Circuit as to whether the person objecting to a given search or seizure had a reasonable expectation of privacy in the area invaded

have been extremely restrictive.[1/]

These decisions not only misapprehend the nature of this Court's "standing" opinions but act as an unreasonable bar toward the litigation of legitimate Fourth Amendment issues. Without such litigation terms like probable cause and reasonable suspicion remain illusive and uncomprehendable to the public and most importantly to law enforcement officers who require guidance and training to conduct legitimate searches and seizures in good faith reliance upon neutral principles. A Court which closes its doors to legitimate questions properly before it avoids its responsibility under our constitutional process.

Naturally, Fourth Amendment protection is

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1 / United States v. Manbeck, 744 F.2d 360 (4th Cir. 1984)(En Banc) cert. den. ___US___, 105 S.Ct. 1197 (1985); United States v. Givens, 733 F.2d 339 (4th Cir. 1984); United States v. Ladd, 704 F.2d 134 (4th Cir. 1983); United States v. Bellina, 665 F.2d 1335 (4th Cir. 1981); Lee v. Gilstrap, 661 F.2d 999 (4th Cir. 1981) cert. den. 456 U.S. 907 (1982); United States v. Dickerson, 655 F.2d 559 (4th Cir. 1981).

accorded only to a person who has a privacy interest in the "area" searched. United States v. Salvucci, 448 U.S. 83 (1980), Rawlins v. Kentucky, 448 U.S. 97, Rakes v. Illinois, 439 U.S. 128 (1978). And while property ownership is a factor to be considered in determining privacy interests it is "neither the beginning nor the end" of the Court's inquiry. United States v. Salvucci, supra at 92. "One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation by the right to exclude. Supra.

However, the decision below characteristically disregarded these well established expectation of privacy principles and held that the petitioner did not have the requisite expectation because he failed to give a detailed accounting of how he obtained possession of the package. (Appendix p. 26a)

In so ruling the court ignored the inferences which clearly flow from the evidence pre-

sented. There was no dispute that petitioner was in exclusive possession of the container. Also the parcel had all the earmarking of sealed mail. Furthermore petitioner's explanation that someone or a friend who knew he was going to Richmond asked him to deliver the parcel established a bailment relationship. Finally, in exercising his authority to exclude others from examining the parcel petitioner solidified his relationship to the package. From the totality of all these circumstances a reasonable expectation of privacy should have been found by the court below.

Petitioner respectfully requests this court to issue its' writ of certiorari to resolve the conflict between this case and the decisions of this Court.

The decision below also is in conflict with pertinent decisions from other circuits. In United States v. Richards, 638 F.2d 765 (5th Cir. 1981) defendant received a package not addressed to him and proclaimed he was picking

it up for someone who had telephoned him and that he knew nothing about it's contents. Supra at 768. The Court held that defendant had the necessary privacy expectation to contest the search in part because of his bailee status and the higher privacy expectation accorded mail. Supra at 769. See also United States v. Freire, 710 F.2d 1515 (11th Cir. 1983) cert. den. ___U.S.___, 104 S.Ct. 1277 (1984).

The court below disregarded these opinions and continued the Fourth Circuit's narrow approach of rarely inferring privacy expectation in Fourth Amendment cases. It is respectfully submitted that this Court should issue its writ to resolve this conflict between the circuits.

(2) Certiorari Should be Granted to Review Certain of the Findings of Fact Which Were Not Supported by the Evidence Presented

In order to preserve the Magistrate's error in failing to find facts in accordance with the evidence presented, it is necessary to

raise this issue in this petition. Simply stated a finding is clearly erroneous "when although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed." United States v. U. S. Gypsum Co., 333 U.S. 364, 395 (1948).

There are several instances where the agent stated that he could not recall the exact words which were uttered or could not recall if the petitioner responded to one of his questions. (J.A. p. 50, p. 55, p. 76, p.77, p. 78, p. 79, pp. 88-89) However, instead of finding facts which reflected this honest uncertainty the Magistrate created more definite answers than those recalled by the agent himself. (Appendix pp. 7a-8a)

Often a trial court must resolve conflicting evidence by finding a given witness is more believable than another. However when the same witness can not recall which of two sets of

words were spoken the court may not resolve such a conflict. Because these clarifications have a direct bearing upon the question of whether the petitioner enjoyed a legitimate expectation of privacy in the package he carried and whether the search of that package can be incident to an arrest which followed, this court should issue its writ of certiorari to review the findings of fact and thereafter to correct the errors of the Magistrate.

(3) Certiorari Should be Granted to Review the Holding Below that the Search of the Parcel was Somehow Incident to an Arrest Which Followed said Search Because this Holding Conflicts with the Decisions of this Court.

When a subject is validly arrested both his person and the area within his immediate control defined as his grabbing distance may be validly searched contemporaneously to his arrest. United States v. Robinson, 414 U.S. 218 (1973), Chimel v. California, 395 U.S. 752 (1969). However, "once law enforcement officers have reduced luggage or other person-

al property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain excess to the property to seize a weapon or destroy evidence, a search of the property is no longer an incident to the arrest." United States v. Chadwick, 443 U.S. 1, 15 (1979).

Below, the court of appeals approved of the warrantless search of the mail parcel which the petitioner had carried because the arrest and search"were essentially simultaneous operations." (Appendix p.27a) However this conclusion is irrelevant to the critical question of whether the agent had control of the package before petitioner's arrest.

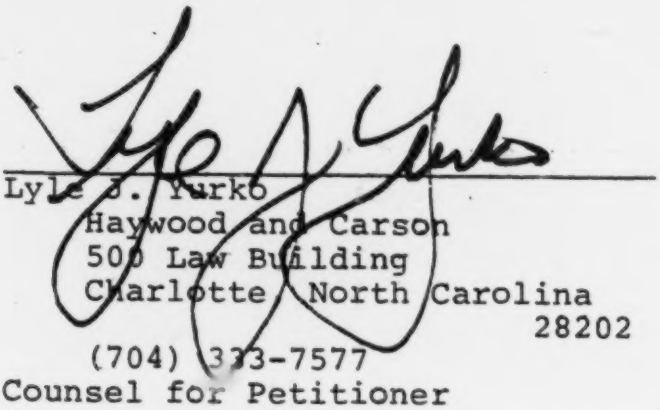
The agent testified that this encounter took place over a ten to twenty minute time period (J.A. pp. 90-91). And it is clear from the evidence presented that Agent Davis retrieved the parcel early in the encounter. (J.A. pp. 49-50) Likewise there is no question

that Agent Davis had the package in his control. (J.A. p. 66, p. 80) And there was clearly no danger that the petitioner might gain access to it. (J.A. pp. 64-65, p. 81)

Because Agent Davis had exclusive control of the package long before petitioner's arrest and because there was no danger that petitioner might gain access to the parcel the jurisprudence of this Court required the agent to procure a warrant before opening the parcel. The ruling of the Court of Appeals below is in conflict with the decisions of this Court. Therefore it is respectfully submitted that this Court should issue its writ of certiorari so that the above noted conflict may be resolved.

CONCLUSION

For the reasons set forth above the petition for writ of certiorari should be granted.



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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-CR-85-34

UNITED STATES OF AMERICA	)	
	)	MEMORANDUM
VS.	)	AND
	)	RECOMMENDATION
JAMES W. HANKS, JR.	)	

THIS MATTER is before the court upon defendant's Motion to Suppress evidence seized during a search conducted by State Bureau of Investigation (S.B.I.) Agent J. A. Davis at Charlotte's Douglas International Airport on January 17, 1985. An evidentiary hearing was held on the Motion on July 9, 1985; defendant was present at the hearing with his retained attorney, Lyle Yurko, and the government was represented by Assistant United States Attorney Debra J. Stuart. After careful review of the evidence and the relevant case law, I submit the following proposed findings of fact and conclusions of law for consideration by the district court and I recommend that the Motion be denied.

FINDINGS OF FACT

For the past six and one-half years, S.B.I. Agent J. A. Davis has been assigned to Douglas International Airport in Charlotte as part of a local Drug Interdiction Program. Tr. at 3. The Program, which was begun in Charlotte in the fall of 1978, is intended to promote the interception of controlled substances being transported to and through Charlotte via commercial air travel. The law enforcement officers involved in the program rely heavily on the Drug Courier Profile[1] to identify travelers who are most likely to be transporting drugs.

On January 17, 1985, Davis was surveilling passengers deplaning a Piedmont flight

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1"In 1974, the Department of Justice Drug Enforcement Administration instituted training programs for its narcotics officers wherein instruction was given on a 'drug courier profile'. A 'profile' is, in effect, the collective or distilled experience of narcotics officers concerning characteristics repeatedly seen in drug smugglers." Florida v. Royer, 460 U.S. 491, 525 n.6 (1983)(Rehnquist, J., dissenting).

from Miami, a "source" city for cocaine. Tr. at 4-5. The defendant in this case, James W. Hanks, Jr., was one of the passengers on the flight. Tr. at 5. Hanks caught Davis' attention because he matched a number of the characteristics in the Drug Courier Profile -- he was young, casually dressed, carrying a small suitcase, and among the last passengers to deplane. Tr. at 5, 7-8, 22. Davis' suspicions were heightened when Hanks approached a Piedmont representative and asked for directions to a connecting flight to Richmond, Virginia. Tr. at 5. Davis had received information from the Drug Enforcement Administration indicating an increased use of commercial air travel to transport drugs from Miami to Richmond and Norfolk and he had recently arrested a number of drug couriers traveling through Charlotte on their way to that area. Tr. at 4, 25, 35. When Hanks began walking down the concourse in the direction of his connecting flight, Davis

began to follow him but lost him in the crowd. Tr. at 7. Davis went to the gate for the flight to Richmond and waited for Hanks to arrive. Tr. at 5, 7. When Hanks checked in at the gate, Davis was able to look at Hanks' ticket, which was in the name of Anderson, and determine that the ticket had been paid for in cash and that Hanks had not checked any luggage. Tr. at 7-8.

As Hanks headed away from the gate towards the concourse, Davis approached him, identifying himself by showing his credentials[2] and saying, "Excuse me, would you mind speaking with me for a minute?" Tr. at 8. When Hanks agreed to speak with Davis, Davis went further to explain that he was conducting a narcotics investigation and that Hanks was not under arrest, but that Davis was asking for his cooperation. Tr. at 9. Hanks laughed and

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2The officers in the local drug interdiction program wear civilian clothes while on duty.

said that he knew that he wasn't under arrest because he hadn't done anything wrong. Tr. at 9.

Davis asked Hanks if he had an airline ticket and Hanks responded by handing his ticket to Davis. Tr. at 9. Davis looked at the ticket, confirmed the information he had previously obtained from a brief glance at it, and handed it back to Hanks. Tr. at 9. Davis then asked Hanks if he had any identification and Hanks replied that he did not. Tr. at 9. In response to further questions, Hanks told Davis that he was going to Richmond to see his daughters and that he expected to be in the area for two to three days. Tr. at 9. Davis next asked Hanks what line of work he was in and Hanks said that he was a disabled veteran. Tr. at 10.

Davis told Hanks that he would like to have his further cooperation and asked him if he would consent to a search of his person and his bag. Tr. at 10. Although Davis

specifically told Hanks that he had the right to refuse the search, Hanks agreed to it. Tr. at 10. Davis asked Hanks if he would prefer to have the search done in a more private setting and Hanks said that he would. Tr. at 10. For this reason, the men moved ten or fifteen feet to a construction area where they could not be readily seen by the public. Tr. at 10. Davis found nothing on Hanks when he patted him down, but when he opened Hanks' carry-on bag, he found an 11" x 16" sealed brown envelope which was addressed to a Ray or Randy Coates at a street address in Richmond, Virginia. Tr. at 11, 38. The return addressee was Allen Gruin in Fort Lauderdale, Florida. Tr. at 11, 38. When Davis picked up the envelope, he could feel a powdery substance with some lumps in it inside the envelope. Tr. at 42, 44-46, 51. Based upon his training and experience, Davis concluded that the envelope contained cocaine. Tr. at 13-14, 44-45.

Davis asked Hanks what was in the envelope. Tr. at 12. Hanks told Davis that he did not know what was in the envelope and that the envelope did not belong to him. Tr. at 12, 7. According to Hanks, some "guy" he met in a bar gave him the envelope to take to Richmond. Tr. at 17, 12. Hanks claimed that he did not know the guy in the bar, nor the men whose names appeared on the envelope. Tr. at 12, 17. Davis asked Hanks how he was going to locate the addressee, and when Hanks failed to answer, Davis told Hanks that he was going to open the envelope. Tr. at 12. Hanks told Davis that he was not sure that he could let Davis open the envelope because it did not belong to him and he asked Davis if he could use the phone. Davis said, "You can make a phone call. You're not under arrest." Tr. at 12.

Davis' exchange with Hanks was observed from a distance by two of Davis' friends who happened to be visiting the airport that

evening. Tr. at 26-29. As Hanks walked to the phone, Davis asked one of his friends, who was a registered nurse, to come over and feel the envelope to see if he could tell what was inside. Tr. at 43. After squeezing the envelope, Davis' friend said the contents felt like rock powder. Tr. at 43. Davis quickly followed Hanks over to the phone and heard him say, "I've got to talk to Ed. I've got a problem at the airport." Tr. at 13. At this point, Davis said, "I'll solve your problem," and opened the envelope. Tr. at 13. Inside was a plastic bag containing a white lumpy powder which Davis recognized as cocaine. Tr. at 18. Davis told Hanks that he was under arrest for trafficking in cocaine and asked him to hang up the phone. Tr. at 18-19. Davis then escorted Hanks to the Drug Interdiction Office. Tr. at 19. A subsequent laboratory analysis confirmed that the powder in the envelope was cocaine. Tr. at 18.

CONCLUSIONS OF LAW

A. SEARCH OF THE SUITCASE

In order to determine whether Davis' stop of Hanks at the airport violated Hanks' rights under the Fourth Amendment, it must first be determined whether the stop was a seizure. United States v. Mendenhall, 446 U.S. 544 (1980). In making this determination, it should be remembered that

> "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may [a court] conclude that a 'seizure' has occureed." Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968)....[However,] an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." [United States v.] Mendenhall, [446 U.S.] at 554 (footnote omitted); see Florida v. Royer, 460 U.S. [491] (1983) (plurality opinion).

Immigration and Naturalization Service v. Delgado, ___ U.S. ___, ___, 104 S. Ct. 1758, 1761 (1984).

Under the totality of the circumstances, I find that Davis' initial contact with Hanks was consensual and did not amount to a seizure under the Fourth Amendment. Davis' preliminary approach of Hanks did not include a show of force and was not threatening or intimidating in any way. Instead, Hanks was faced with a single law enforcement officer who was in civilian clothes and approaching him in very public surroundings. Davis' precatory request of Hanks ("Would you mind speaking with me for a minute?") made it abundantly clear that Hanks had the right to refuse.

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions [and] by putting questions to him if the person is willing to listen. . . . Nor would the fact that the officer identifies himself as a police officer, without more,convert the encounter into a seizure requiring some level of objective justification."

Florida v. Royer, supra at 497 (citations omitted).

Hanks freely consented to Davis' requests to talk to him and for production of his plane ticket. After viewing Hanks' ticket, confirming that it had been paid for in cash and contained no baggage claim checks, and learning that Hanks, who was visibly nervous, was carrying no identification, Davis had an articulable suspicion that would have justified detaining Hanks for further questioning if Hanks had attempted

to end the encounter.[3] See Florida v. Royer, supra at 502; United States v. Harrison, 667 F.2d 1158 (4th Cir.), cert. denied, 457 U.S. 1121 (1982); United States v. Corbin, 662 F.2d 1066 (4th Cir. 1981). However, instead of

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3In Reid v. Georgia, 448 U.S. 438 (1980), the Supreme Court held that general characteristics included in the Drug Courier Profile which apply to a large number of innocent travelers cannot alone reasonably support a suspicion of criminal activity. United States v. Corbin, 662 F.2d 1066 (4th Cir. 1981). However, such characteristics "coupled with other suspicious circumstances may provide the reasonable grounds for suspicion required under the Fourth Amendment." United States v. Harrison, 667 F.2d 1158, 1161 (4th Cir.), cert. denied, 457 U.S. 1121 (1982).

Although the inability (or unwillingness) to produce identification is, for obvious reasons, a Drug Courier Profile characteristic, it is not a characteristic that would apply to a large number of innocent travelers. Indeed, common sense compels the conclusion that it would be highly unusual for a law-abiding adult, traveling interstate on a commercial airline, not to carry a wallet containing cash and some type of identification. Accordingly, Hanks' inability to produce any type of identification, in tandem with his other drug courier characteristics, provided Davis with reasonable suspicion that Hanks was involved in a criminal endeavor. See tr. at 22-23.

attempting to terminate the conversation, Hanks continued to agree to Davis' requests and inquiries and consented to a search of his person and his bag after he was specifically advised that he had the right to refuse to allow the searches and that Davis was merely seeking his cooperation. Under the totality of the circumstances, I conclude that Hanks' consent to search was given voluntarily. See United States v. Mendenhall, supra. Inasmuch as Davis' exchange with Hanks

"amounted to no more than a permissible police encounter in a public place,"[4] Hanks' voluntary consent legalized the search of his person and his bag. Florida v. Royer, supra at 501.

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[4]Defendant has relied on United States v. Gooding, 695 F.2d 78 (4th Cir. 1982), to argue that Davis' encounter with Hanks constituted a Terry stop; however I find Gooding to be inapposite to the facts of this case. Although the method employed by the agents in their initial approach of Gooding was somewhat similar to that used by Davis in the instant case, the district court in Gooding found, in a very brief Memorandum, that the approach was a Terry stop. The Fourth Circuit declined to disturb the district court's ruling that a Terry stop had occurred, but diminished the precedential value of the ruling by stating that "[i]n view of the unelaborated nature of the [district court's] order," this was not the occasion to resolve the issue of whether brief contact between a police officer and a citizen invariably constitutes a seizure under the Fourth Amendment. 695 F.2d at 81. Subsequent Supreme Court decisions have made it abundantly clear that a law enforcement officer may approach a citizen in a public place without involving the Fourth Amendment. See,e.g., Immigration and Naturalization Service v. Delgado, supra; Florida v. Royer, supra.

B. SEARCH OF THE SEALED ENVELOPE

The "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978). Furthermore, the burden is upon the proponent of a suppression motion to establish that his legitimate expectation of privacy has been violated by the challenged search. United States v. Bellina, 665 F.2d 1335 (4th Cir. 1981).

Hanks was neither the sender nor the addressee shown on the envelope; moreover, he specifically disavowed ownership of the envelope or any knowledge of its contents. By disclaiming any interest in the envelope or its contents, Hanks affirmatively indicated that he had no expectation of privacy in the envelope's contents and Davis "could justifiably rely on [Hanks'] statements

to think [he] would not violate [Hanks'] rights by opening the [envelope]." United States v. Washington, 677 F.2d 394, 396 (4th Cir.), cert. denied, 459 U.S. 854 (1982).

Even assuming arguendo that defendant did have a privacy interest in the sealed envelope, the search of the envelope did not violate the Fourth Amendment. Hanks' consent to search his bag necessarily encompassed a consent to handle the contents of the bag in the course of the search. When Davis picked up the sealed envelope from Hanks' bag and was able to feel a "rock powder" substance inside it, he concluded, based upon his training and experience, that the envelope contained cocaine. Hanks' evasive and implausible answers to Davis' questions about the envelope served to support Davis' conclusion and, at that point, David had abundant probable cause to arrest Hanks and the right to search the envelope under the "search-incident-to-arrest exception" to

the warrant requirement. United States v. Porter, 738 F.2d 622, 627 (4th Cir. 1984), cert. denied, 105 S. Ct. 389 (1985). See New York v. Belton, 453 U.S. 454 (1981).

RECOMMENDATION

Based upon the foregoing proposed findings of fact and conclusions of law, I respectfully recommend that defendant's Motion to Suppress be denied.

Counsel are hereby advised that, pursuant to 28 U.S.C. §636(b)(1)(C), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within ten (10) days after service of same. Failure to file objections to this Memorandum with the district court will preclude counsel from raising such objections on appeal. United States v. Schronce, 727 F.2d 91 (4th Cir.), cert. denied, _____ U.S. _____, 52 U.S.L.W. 3844 May 21, 1984).

The Clerk is directed to certify copies of this Memorandum and Recommendation to defense counsel and the United States Attorney.

This 13th day of August, 1985.

/s/ Barbara Delaney
Barbara H. DeLaney
United States Magistrate

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-CR-85-34

FILED
CHARLOTTE, N.C.
October 8, 1985

UNITED STATES OF AMERICA)
)
VS.) O R D E R
)
JAMES W. HANKS, JR.)
) U.S. DISTRICT COURT
) W. DIST. OF N.C.

On July 8, 1985, defense counsel filed a Motion to Suppress evidence seized during a search conducted by State Bureau of Investigation (S.B.I.) Agent J. A. Davis at Charlotte's Douglas International Airport on January 17, 1985. The United States Magistrate held an evidentiary hearing on the Motion on July 9, 1985 and filed a Memorandum and Recommendation on August 13, 1985. In the Memorandum, the Magistrate found that Defendant's rights under the Fourth Amendment were not violated by the conduct of S.B.I. Agent Davis and she recommended that the Motion to Suppress be denied.

On August 26, 1985, Defendant filed

Objections to the Magistrate's Memorandum and Recommendation. Defendant subsequently filed an Amended Brief in Support of his Objections. A hearing was held on October 2, 1985, on Defendant's Objections. After careful consideration of the arguments offered by counsel for the parties at this hearing and review of the Magistrate's Memorandum and Recommendation, the Court finds that the Magistrate's proposed findings of fact are supported by the record and that her proposed conclusions of law are consistent with current case law. Accordingly, the Court hereby adopts the Magistrate's Findings of Fact and Conclusions of Law and accepts her Recommendation that the Motion to Suppress be denied.

IT IS,THEREFORE, ORDERED that Defendant's Motion to Suppress be, and the same is hereby, DENIED.

The Clerk is directed to certify copies of this Order to defense counsel and the

United States Attorney.

This the 2nd day of October, 1985.

/s/
ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 85-5251

United States of America,

Appellee,

versus

James William Hanks,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge. (C-CR-85-34)

Argued: March 7, 1986 Decided: June 9, 1986

Before WIDENER and HALL, Circuit Judges, and MICHAEL, United States District Judge for

the Western District of Virginia, sitting by designation.

Lyle J. Yurko (Haywood, Carson & Merryman on brief) for Appellant; Kenneth P. Andresen, Chief Assistant United States Attorney (Charles R. Brewer, United States Attorney on brief) for Appellee.

PER CURIAM

The appellant in this case pled guilty to a charge of possession of a Schedule Two controlled substance, cocaine, but conditioned his plea of guilty by a reservation of right to have reviewed the adverse determination of his motion to suppress.

The appellant presents four issues for resolution: first, whether the findings of fact of the Magistrate, who conducted the suppression hearing, were supported by the evidence presented; second, whether the defendant had standing to object to the

search of a certain parcel containing the cocaine, which defendant claims he lawfully possessed; third, whether the court was in error in ruling that the encounter between the arresting officer and defendant was entirely consensual, in that the stop of the defendant was assertedly a Fourth Amendment seizure; finally, whether the court was in error in ruling that the search of the mail parcel was incident to the arrest.

Almost sixty pages of the joint appendix are devoted to a transcript of the hearing on the motion to suppress conducted before the Honorable Barbara De Laney, the Magistrate. Careful review of the findings of fact made by the Magistrate in comparison with the transcript of the hearing before her indicate that there is no support for the first assignment of error. Obviously, the findings of fact did not set out every particle of evidence adduced before the Magistrate, but the findings of fact, when compared with the

transcript, represent a thorough and balanced statement of the material evidence which was presented before her.

Turning to the second assignment of error, the appellant testified that the parcel in question had been given to him by a stranger in a bar in Florida on the previous night, when the stranger learned that Hanks planned to travel to Richmond, Virginia, the next day. Hanks further testified that he did not know the person who was indicated as sender on the parcel (apparently a person different from the one who gave him the parcel), and further did not know how he would be able to identify the person to whom the package was addressed. Hanks was in possession of the envelope at the Douglas Airport in Charlotte, North Carolina, when he was approached by an agent of the North Carolina State Bureau of Investigation, who inquired if the Appellant would be willing to stop and talk with him.

The recitation of evidence set out supra is all that the joint appendix reveals concerning the manner in which Hanks came into possession of the envelope. That evidence is not sufficient to support a finding of a contract of bailment, either express or implied. Certainly, no consideration has flowed in connection with what is essentially a gratuitous act on the part of Hanks to carry the package to Richmond, if we assume that all Hank's testimony is entirely accurate. Such a gratuitous undertaking does not support a finding of a reasonable expectation of privacy in the envelope.

As to the third issue, the joint appendix clearly shows that the agent gave no indication of any sort that Hanks was not free to leave at any time. The agent identified himself, asked if he could talk with Hanks, told Hanks that he was not under arrest, permitted Hanks to leave the immediate

presence of the agent to go to a telephone to make a phone call, and did not in any way interfere impermissibly with Hank's right to come and go. In short, there is nothing to show that the encounter between the agent and Hanks was not entirely a consensual encounter.

The fourth asserted error deals with the question of whether the search of the parcel was incident to the arrest. Careful consideration of the joint appendix indicates that the opening of the envelope and the placing of Hanks under arrest were essentially simultaneous operations. There was ample evidence to give the agent reasonable cause to think that Hanks might be carrying illicit drugs. The fact pattern disclosed in the joint appendix simply negates the argument that the opening of the parcel was not incident to the arrest itself.

For the reasons indicated, the judgment of the Court below is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-5251

FILED
Jun 16 1986
U.S. COURT OF
APPEALS
FOURTH CIRCUIT

United States of America,

Appellee,

versus

James William Hanks,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge.

Upon consideration of appellant's motion for extension of time to file a petition for rehearing and request for stay of mandate and the appellee's agreement thereto,

IT IS ORDERED that pursuant to Rule 40 of the FRAP the time for filing the petition for rehearing is extended to and including July 7, 1986.

For the Court -
By Direction

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-5251

FILED
JUL 29 1986
U.S. Court of Appeals
Fourth Circuit

United States of America,

Appellee,

versus

James William Hanks,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for

rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Michael, for a panel consisting of Judge Widener, Judge Hall and Judge Michael, United States District Judge, sitting by designation.

For the Court,

JOHN M. GREACEN
CLERK